



**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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August 5, 2020

TO: Commissioners  
FROM: Counsel Staff  
RE: Developments in the Counsel's Office since June 25, 2020

**Commission Cases**

**Update on Federal Court Litigation involving the Commission**

The Chairman and several current and former members of the Commission were named as defendants in federal lawsuits that were filed after public sector agency shop arrangements were declared unconstitutional in Janus v AFSCME, 138 S.Ct. 2448 (2018).

In Smith, et al. v. NJEA, et al., 2019 U.S. Dist. LEXIS 205960 and Thulen v. AFSCME, 2019 U.S. Dist. LEXIS 221502, Judge Renee M. Bumb granted motions dismissing the PERC defendants from the litigation. Those rulings and other related cases are now pending before the United States Court of Appeals for the Third Circuit. Since the last Commission meeting, oral argument has been scheduled for September 22, 2020 in Thulen, and October 1, 2020 in Smith, on briefs filed by the Counsel's office urging affirmance of the District Court's orders. And in Lutter v JNESO, et al., Dkt No. 1:19-cv-13478, also pending before Judge

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Bumb, the Counsel's office filed a brief in opposition to the plaintiff's cross-motion for declaratory judgment.

### **Petitions for Certification**

On June 23, 2020, the City of Orange Township filed a notice of petition for certification of In the Matter of City of Orange Township and PBA Local 89, 2020 N.J. Super. Unpub. LEXIS 1047 (Sup. Ct. Dkt No. 084637, App. Div. Dkt No. A-4310-18T3). In that decision, the Appellate Division affirmed the Commission's decision (P.E.R.C. No. 2019-40) holding that the City engaged in unfair practices when it adopted an ordinance announcing the elimination of terminal leave payments to PBA unit members. In July the City moved for an additional 30 days in which to file its brief in support of certification.

### **Appeals from Commission Decisions**

There were no new appeals filed since June 25.

There was activity in appeals from two separate final agency decisions by the Director of Arbitration on requests to appoint special arbitrators to review disciplinary terminations of college campus police officers, pursuant to N.J.S.A. 40A:14-210. In In the Matter of New Jersey Institute of Technology (NJIT), Officer Gregory DiGuglielmo and Public Employment Relations Commission (App. Div. Dkt No. A-003772-19T2), NJIT filed an amended appeal, the State of New Jersey and the New Jersey State Lodge of the Fraternal Order of Police respectively moved to appear as Amicus Curiae, and Counsel's office and Mr. DiGuglielmo respectively filed supplemental merits briefs, in NJIT's appeal from the Director's determination (DA-2020-004) that Mr. DiGuglielmo is eligible for special disciplinary arbitration.

In In the Matter of Rutgers University Police Department and Leslie Jones (App. Div. Dkt No. A-002286-19T3), Counsel's office filed a brief in opposition to Mr. Jones' cross-motion to supplement the record in his appeal from the Director's determination (DA-2020-002) that he is ineligible for special disciplinary arbitration. The Court then denied Mr. Jones' cross-motion, granted Rutgers' related motion to strike portions of Mr. Jones' brief and appendix, and set a new briefing schedule.

### **Commission Court Decisions**

College's new academic-specialist position was non-supervisory, shared community of interest with existing unit

In the Matter of Union County College and Union County College Chapter of the American Association of University Professors, 2020 N.J. Super. Unpub. LEXIS 1513 (App. Div. Dkt No. A-3625-18T2)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's order (P.E.R.C. No. 2018-011) denying review of a "clarification of unit" decision of its Director of Representation, which determined that the Union County College's newly created "academic specialist" position shall be included in the collective negotiations unit of instructional and professional library staff represented by the College's Chapter of the American Association of University Professors, because academic specialists are not supervisors under N.J.S.A. 34:13A-5.3, and share a community of interest with existing unit members. The Court found the Commission did not act arbitrarily, appropriately exercised its expertise and relied on its own precedent in determining that a community of interest existed, and the decision was consistent with the policy favoring broad-based negotiation units.

School board must negotiate shift in dental insurance premium costs resulting from voluntary switch from public to private health insurance provider

In the Matter of Matawan-Aberdeen Regional Board of Education and Matawan-Aberdeen Regional Education Association, 2020 N.J. Super. Unpub. LEXIS 1505 (App. Div. Dkt No. A-4232-18T3)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's decision (P.E.R.C. No. 2018-048) declining to restrain binding arbitration of a grievance and ruling that the Matawan-Aberdeen Regional Board of Education was obligated to negotiate a shift in dental insurance premium costs from the Board to members of the Matawan-Aberdeen Regional Education Association when the Board replaced the members' public health insurance provider with a private one. The Court concluded that PERC correctly interpreted Chapter 78 as not preempting the parties' collective negotiation agreements, which required the Board to pay such premiums. The Court found the voluntary, non-mandated nature of the change rendered the dispute mandatorily negotiable and legally arbitrable. The Court concluded that PERC rightly reached a different result from a prior contrary decision, and no binding court precedent restricted it from doing so.

Interest Arbitration award adequately considered/analyzed statutory factors and Chapter 78, did not violate N.J.

Arbitration Act, and arbitrator's alleged conflict of interest did not warrant award's vacation

In the Matter of Township of Bedminster and PBA Local 366, 2020 N.J. Super. Unpub. LEXIS 1503 (App. Div. Dkt No. A-0176-19T2)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's decision (P.E.R.C. No. 2020-11) affirming an Interest Arbitration award. The Court found: (1) the Commission's decision was amply supported by the analysis in the award; (2) the PBA did not establish that it was arbitrary, capricious, or unreasonable; or that (3) the arbitrator failed to adequately consider or analyze the statutory factors enumerated in N.J.S.A. 34:13A-16(g); (4) the award did not violate the New Jersey Arbitration Act; (5) the arbitrator specifically addressed the effect of Chapter 78 health benefit contributions on actual salaries, and related comparative evidence; (6) there was no merit to the PBA's contention that the arbitrator was mistaken about certain party proposals; and (7) the PBA acquiesced in the arbitrator's appointment despite having knowledge of his former position from his disclosure in the interest arbitrator bio filed with PERC, and never raised the issue until after the award was made, thus an alleged undisclosed conflict of interest of the arbitrator did not warrant vacating the award.

Merits of major disciplinary action against college campus police officer may not be challenged through binding arbitration

In the Matter of Rutgers, the State University of New Jersey, and FOP Lodge 164, Superior Officers Association, 2020 N.J. Super. Unpub. LEXIS 1475 (App. Div. Dkt No. A-4334-18T1)

The Appellate Division of the Superior Court, in an unpublished opinion (attached), affirms the Commission's decision (P.E.R.C. No. 2019-44) restraining binding arbitration on the merits of a disciplinary termination of a Rutgers police officer, because police officers may not contest the merits of major discipline (suspensions or fines of more than five days, demotions, and terminations) through contractual binding arbitration. The Court rejected the FOP's arguments that this prohibition, announced in State v. State Troopers Fraternal Association, 134 N.J. 393 (1993), does not apply to campus police officers. The Court found that the FOP failed to establish that the Commission's decision was: (1) arbitrary, capricious, or unreasonable; (2) violated express or implied legislative policies; (3) offended the State or Federal Constitution; or that (4) the findings on which it was based were not supported by substantial, credible

evidence in the record.

**Non-Commission Court Decisions Related  
to the Commission's Jurisdiction**

Arbitrator's award of acting-Captain's pay to Lieutenants vacated as not reasonably debatable

Borough of Carteret v. Firefighters Mutual Benevolent Association, Local 67, 2020 N.J. Super. Unpub. LEXIS 1239 (App. Div. Dkt No. A-2277-18T3)

The Appellate Division of the Superior Court, in an unpublished opinion, vacated an arbitrator's award of acting-Captain's pay to Lieutenants employed in the Borough of Carteret's fire department. The Court, reversing the Chancery Division, found the arbitrator interpreted the relevant provision of the parties' collective negotiations agreement (CNA) in a manner that was not reasonably debatable. The Court noted: (1) that when the provision was agreed to the position of Lieutenant did not exist, and (2) the civil service job description for fire lieutenant includes temporarily filling in for Captains. The Court further found that the arbitrator should not have ignored a four-year past practice after the establishment of the Lieutenant title, wherein the FMBA never claimed Lieutenants were entitled to acting-Captain's pay.

Police Internal Affairs investigation reports were exempt from disclosure under OPRA and the common law right of access

Richard Rivera v. Union County Prosecutor's Office, et al, and City of Elizabeth, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. Dkt No. A-2573-19T3)

The Appellate Division of the Superior Court, in an unpublished opinion, held that police Internal Affairs (IA) investigation reports and documents are exempt from disclosure under New Jersey's Open Public Records Act (OPRA) and the common law right of access, even if all personally identifiable information was redacted. The Court, reversing the Law Division's order compelling the defendants to produce the complete record of an IA investigation of a former Elizabeth Police Department (EPD) Director's alleged workplace misconduct, found that disclosure of a complainant's identity could: (1) thwart an IA investigation, criminal investigation, or prosecution; (2) disclose the name of an informant; (3) taint an officer who was wrongfully accused; and (4) discourage complainants from coming forward or encourage unwarranted complaints from people seeking notoriety. The Court

concluded that redaction of the names and identifying circumstances, as the trial court ordered, would not protect the complainants and witnesses because they were members of the EPD, and their statements would likely disclose their identity or narrow the field to only a few individuals.

Civil Service Commission correctly determined layoff rights of police officers affected by the Bergen County Sheriff's Office's absorption of the former Bergen County Police Department

In the Matter of Alan Brundage, et al, and Bergen County Sheriff's Office, 2020 N.J. Super. Unpub. LEXIS 1282 (App. Div. Dkt No. A-3466-17T3)

The Appellate Division of the Superior Court, in an unpublished opinion, affirmed a final agency decision of the Civil Service Commission (CSC), finding that its Division of Appeals & Regulatory Affairs (Agency Services) correctly determined the layoff rights of police officers affected by the Bergen County Sheriff's Office's (BCSO) absorption of the former Bergen County Police Department (BCPD), pursuant to a layoff plan approved by the CSC. The CSC found that: (1) layoff rights were not available against the BCSO officers and the affected officers' demotional rights were determined in accordance with applicable regulations, and (2) that the BCPD sergeants, lieutenants, and captains had displacement rights against other BCPD officers, but the BCPD police officers did not have displacement rights. The Court concluded that the CSC's final decision, incorporating an earlier decision denying the PBA a stay of approval of the layoff plan, satisfied its obligation to provide an adequate statement of reasons for its decision, and that the PBA failed to establish that the CSC's determination was arbitrary, capricious, or unreasonable.